NO. 46105-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD AUER and JOHN TRASTER,

Appellants/Cross-Respondents,

v.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

Appellants, Plaintiffs below, brought actions for legal malpractice and violation of Washington's Consumer Protection Act ("CPA") against the Anderson Hunter Law Firm, P.S. as well as attorneys Christopher Knapp and Geoffrey Gibbs of that law firm; and against a former member of that firm, J. Robert Leach.[1] Summary Judgment was granted on January 3, 2014 because Plaintiffs failed to present evidence sufficient to make a prima facie case against any Defendant. Plaintiffs appeal that ruling.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error Pertaining to Appeal

The trial court erred in considering evidence to which Defendants objected when it made its summary judgment ruling on January 3, 2014. RP 63-64; CP 20.

B. Assignment of Error Pertaining to the Cross-Appeal.

The trial Court erred when it (1) failed to dismiss Plaintiffs' legal malpractice claims based on the statute of limitation and (2) declined to dismiss all claims against defendants Knapp, Gibbs, and Anderson Hunter based on insufficiency of process and insufficiency of service of process, on November 1, 2011. CP 15.

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[1] Judge Leach joined the Court of Appeals, Division 1, on March 1, 2008. This appeal from the Snohomish County Superior Court was transferred to this Division because of his involvement in the case.

III. STATEMENT OF THE ISSUES

1. Did the Court properly dismiss plaintiff's claims by summary judgment where they failed to present admissible evidence sufficient to establish claims for legal malpractice and violation of the Consumer Protection Act?

2. Did the Court err in its rulings admitting certain evidence submitted in opposition to the summary judgment motion?

3. Did the Court properly deny plaintiffs' motion for reconsideration?

4. As an alternative basis for dismissal, should the Court have dismissed claims because the plaintiffs' failed to commence their action within the three year limitation period (RCW 4.16.080), and because plaintiffs did not effect service of some defendants?

IV. STATEMENT OF THE CASE

This appeal involves two underlying lawsuits. Plaintiffs dismissed the first, filed in 2003, in September 2005. Plaintiffs re-filed their action in 2006 and ultimately settled that matter in May 2009. The defendant attorneys withdrew from the representation in April 2008; Plaintiffs retained other attorneys; and they settled their claims in May 2009. They filed their action against defendants in February 2011. *See* CP 129-30; 150-55.

A. Facts concerning the lawsuits underlying the present case.

On March 3, 2003, Plaintiff John Traster purchased two five-acre lots in Snohomish County for $138,500. CP 363 (¶4). The purchase and sale agreements ("PSAs") underlying the transaction each contained the following provision regarding the access driveway to these lots, set out in an addendum to each PSA:

> Seller will rough in and complete the driveway from Russian Road to the north line of Lot 2 within the easement presently recorded. Complete shall mean receipt of a County access permit from Russian Road with culvert, placement of a culvert at the bottom of the draw on Lot 1, rough in with dirt to a width sufficient for two cars to pass and a constant agreed grade which shall include a radius off Russian Road, ~~utility trench backfill (buyer will open the utility trench and place utilities at his expense)~~, and sufficient rock to make a smooth all weather running surface.
>
> Seller agrees to perform this work within 60 days of closing. In the event the work is not done as agreed, Seller will be liable for the expense of Buyer's doing the work.

CP 103.

The dispute resulting in the 2003 lawsuit centered on the fact that Plaintiffs wanted the seller, the Westland Estate ("Westland"), to build the access road to a standard memorialized in the PSAs. Mr. Auer made clear that Plaintiffs had no desire to complete the permitting for an access road themselves "[d]ue to the expense." CP 404-405.[2] Plaintiffs retained Defendant Leach in April 2003 and, in their own words, made clear their

[2] In fact, despite having obtained an additional easement to allow road construction to occur outside the original 30 foot easement, Plaintiffs have not undertaken to build the road the way they alleged the Westland Estate should have done. CP 129-30; 134 -139.

objective was to bring a suit for damages against the Westland Estate. CP 478 ("We are absolutely certain that we will file suit to recover the road completion expenses and damages, so plan accordingly").[3] Westland failed to build the road to Plaintiffs' satisfaction and, in October 2003, Plaintiffs sued Westland for breach of contract. CP 607.

It is uncontroverted that an access road meeting the specifications in the PSA could not be constructed without an easement from a non-party to the contracts. Accordingly, in the underlying lawsuit, Westland raised the defense of "impossibility," CP 391(n.5); CP 401, and when negotiating the 2009 settlement, Plaintiffs conceded the "impossibility" issue through acknowledging the PSA-envisioned access road could not be built absent an additional easement to be procured from a non-party neighbor. CP 384-85. Plaintiffs used the road Westland constructed in 2003 for access and construction of three buildings, including Plaintiff Traster's home and Plaintiff Auer's 4800 square foot shop where he has been living since 2005. CP 147-153; *see also* CP 390.

Plaintiffs' claims faced challenges, including a lack of financial records to support Mr. Auer's claims; Mr. Auer had not filed income tax returns from 2000 through 2004. *See* CP 393.[4] When the underlying defendants filed a motion for summary judgment, Plaintiffs opted to

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[3] Westland then joined the real estate agent who brokered the deal, Rhinevault. CP 364 (¶5).

[4] In fact, Mr. Auer did not file his federal income tax returns for the years 2000 through 2007 until September 2008, when he filed returns for all eight years (2000 – 2007). CP 393. This occurred after Defendants' withdrawal from the representation.

voluntarily dismiss the action without prejudice, gaining time to gather information needed to support their claim.

Despite Plaintiffs' assertions that they were forced to "walk[] away from an $8 million claim," Appellants Brief at 30, their alleged damages in the underlying matter were anything but established.[5] *See* CP 392-401. Rather, as the underlying defendants pointed out at the mediation that resulted in settlement, Plaintiffs' "alleged damages figures [] [were] way beyond the bounds of plausibility" and very much in dispute. CP 388.

On January 25, 2008, Defendant Knapp advised Plaintiffs that Defendant Leach had, a few days earlier, been appointed to serve as a judge with the Washington State Court of Appeals, beginning March 1, 2008. CP 475. Therefore, Defendant Leach could no longer act as Plaintiffs' attorney, and Plaintiffs needed to find another attorney – either within or outside of the Anderson Hunter firm – to represent them.

In response, Plaintiffs acknowledged that Defendant Leach's appointment meant a "new relationship" between them and the Anderson Hunter firm. CP 474. That same day, Defendant Knapp notified Plaintiffs that Defendant Gibbs was willing to consider undertaking their

[5] Indeed, as Defendants pointed out at the underlying case's mediation, the lion's share of Plaintiffs' alleged damages in the underlying case were predicated on the alleged consequential damages of Plaintiff Auer and his business, North American Hydroponics. However, Auer's right to recover such damages, even if the amount could have been established, was not certain. Auer had not purchased the lot from Westland; he purchased from John Traster after Traster purchased the two lots from Westland. As Traster's assignee, Auer could only seek such damages as Traster had, and Defendant's had a pending CR 56 motion to dismiss Auer's alleged consequential damages at the time the case settled at mediation. CP 392.

representation, and that if Mr. Gibbs was not willing to take on the case, Plaintiffs would need to transition the matter to counsel outside Anderson Hunter. *Id.* Plaintiff Auer replied, "[s]ounds good." CP 474. Ultimately, Defendant Gibbs determined he was not willing to undertake the representation of Plaintiffs, and the Anderson Hunter firm obtained court approval to withdraw, over Plaintiffs' objection. CP 1013.

After the Lawyer Defendants withdrew as counsel effective April 16, 2008, Plaintiffs obtained a trial continuance. They retained replacement counsel and after further litigation, in May 2009 agreed to settle their claims with Westland and the real estate agent, Rhinevault. The settlement called for a cash payment of $500,000.00 (half of the insurance policy limit), and for Westland to procure for Plaintiffs an easement from a neighbor who had a relationship to the Westland Estate. CP 408. No attorney from the underlying case has provided testimony that Plaintiffs would have obtained more than the $500,000 payment, or any other benefit, but-for alleged conduct of any Defendant / Respondent in this case. *See* RP (1-3-14) at 66.

B. Facts pertaining to Defendants' cross-appeal.

As previously explained, none of the Defendants represented plaintiffs after the Court's April 16, 2008 order that authorized the Anderson Hunter attorneys to withdraw from the representation. On February 14, 2011, plaintiffs, appearing pro se, filed a summons and complaint for the instant legal malpractice action in Snohomish County Superior Court. CP 1115-1130; CP 1132-1135. The summons filed in

this action contains the heading: "Superior Court of Washington County of Snohomish" and was signed by Mr. Auer and Mr. Traster. That Summons was filed with the Complaint. CP 1115-1130. It was not served on any defendant until June 16, 2011 – over four months after it was filed. Even then, it was not served on other defendants, and some defendants were never served with any summons.

On April 26, 2011, Christopher Knapp, Geoffrey Gibbs and The Anderson Hunter Law firm were served with papers at the Anderson Hunter office. CP 1088-1111. The papers included an unsigned copy of the Snohomish County Complaint, but did not include a copy of the Summons on file with the court clerk, issued February 14, 2011. *See id.* Instead, these defendants each received a copy of a different summons, which stated it was issued on behalf of the King County Superior Court, with the same parties named as Plaintiffs and Defendants. CP 1091-92; CP 1103-04.

This undated King County summons was signed by plaintiffs' counsel, and listed a case number of 11-2-03105-3, which is the case number for the Snohomish County case. *Id.* The documents served at the Anderson Hunter offices also included a copy of an undated Notice of Appearance for the King County action signed by plaintiffs' counsel, and a copy of the court's docket (printed from the Washington Courts' on-line public information site) for the instant action in Snohomish County Superior Court. CP 1088-89; CP 1093-94; CP 1099-1101; CP 1109-1111. The docket listed the Summons and Complaint and named the Plaintiffs as

Pro Se parties. CP 1099; 1111. No other documents were served on these defendants after April 26, 2011. CP 1000-01; CP 1012-13. Mr. Knapp filed a Notice of Appearance for the defendants in the Snohomish County action. CP 1146-47.

On May 4, 2011, Plaintiffs' counsel filed his Notice of Appearance with the Snohomish County Superior Court. CP 1141-42. Unlike his Notice of Appearance served on the attorney-defendants, this Notice of Appearance was dated April 29, 2011, and had a Snohomish County Superior Court heading. *See id.* It was not served on any defendant. *See* CP 1028; 1088-89; 1100-01.

On May 17, 2011, Defendants' counsel sent to plaintiffs' counsel a Notice of Appearance for the unfiled King County action. CP 919-20; CP 942-44. On May 27, 2011, Defendants' counsel appeared in the Snohomish County action by filing a Notice of Withdrawal and Substitution of Counsel and serving it on plaintiffs' counsel. CP 1143-44. On June 8, 2011, the attorney-defendants filed a Motion to Dismiss, arguing that the Snohomish County Superior Court did not have jurisdiction over the attorney-defendants because Mr. Knapp, Mr. Gibbs and Anderson Hunter had not been served with the Snohomish County summons (but instead were served with a summons for a King County Superior Court action), and because the Leach defendants, Jane Doe Knapp and Jane Doe Gibbs were not served with any process. CP 1079-1087. Plaintiffs filed an Opposition on June 15, 2011. CP 1061-1078.

The hearing on the motion was stricken because of judicial recusals. CP 921.

On June 16, 2011, counsel for the attorney defendants accepted service of the Snohomish County Summons and Complaint (filed February 14, 2011) on behalf of the Leach defendants, as plaintiffs had requested the previous day. CP 938; CP 940. June 16, 2011, therefore, was the first date on which the Snohomish County summons was served on any defendant – more than four months after Plaintiffs filed their action in the Snohomish County Superior Court.

Defendants filed a revised motion to dismiss, asserting (1) that no defendants other than the Leach defendants had been served with a summons in the case, and (2) that the June 16, 2011 service was too late to toll the statute of limitation for the action filed on February 14, 2011. *See* CP 1024-1038. The court denied the motion to dismiss, ruling that the King County summons served April 16, 2011 was a sufficient substitute for the Snohomish County summons. CP 811-818. The court's November 1, 2011 order authorized Plaintiffs to amend their summons "to show the correct venue of this action." CP 818.

C. Facts pertaining to Plaintiffs' claims.

Plaintiffs filed their "Complaint for Malpractice and Bad Faith" on February 14, 2011. CP 630-37. The Complaint appeared to assert two causes of action against the Defendants: one for legal malpractice and one

for violating Washington's Consumer Protection Act.[6] With regard to Plaintiffs' legal malpractice claim, their Complaint, fairly read, did not provide notice that Plaintiffs based their legal malpractice claim on Defendant Leach's bringing a case for damages rather than one for "specific performance." CP 634-637.

On December 22, 2011, Defendants sent discovery requests – specifically interrogatories 4, 5, and 7 – seeking particulars concerning Plaintiffs' malpractice allegations. CP 641-42; 650-51. Plaintiffs' responses, dated March 14, 2012, did not indicate Plaintiffs' predicated their legal malpractice claim – in whole or in part – on Defendant Leach's bringing a case for damages rather than one for "specific performance." *See* CP 661-65; 674-78.

Plaintiffs further stated in those responses that they had no experts who were not consulting experts. CP 666, 679. Plaintiffs declined to identify any retained experts or provide the experts' opinions or the experts' records. *See id.* Plaintiffs advised that, "[w]hen plaintiffs retain a testifying expert, or if any consulting expert is retained to testify, responding party will timely amend this response." *Id.*[7]

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[6] Plaintiffs' Complaint included a "Second Claim" that was directed solely at Safeco Insurance, *see* CP 636, which Plaintiff named in their Complaint but never joined by service of process.

[7] The Plaintiffs provided no supplementation to those written discovery requests until November 27, 2013, when they delivered a pleading that states general areas to which an expert may testify. CP 684-89. This supplemental response did not provide bases to support the generic disclosures set out. *See id.*

Pursuant to the trial court's scheduling order, Plaintiffs named an expert witness in their Primary Witness List provided on January 14, 2013. CP 694. Paul Brain of Brain Law Firm PLLC, was identified as a witness who "will offer opinions regarding the breach of standard of care of defendants." *Id.* No other information was provided regarding Mr. Brain's opinions. *See id.* Plaintiffs did not provide the additional information promised in their March 14, 2012 Interrogatory responses. Defendants' counsel asked Plaintiffs' attorney to provide the requested information and documentation regarding Mr. Brain. CP 697. On October 28, 2013, Plaintiffs advised that Mr. Brain had been retained by a predecessor attorney for the Plaintiffs,[8] but supplied no information about Mr. Brains' opinions. CP 696. As of early December 2013, despite the approaching trial date and discovery cutoff, Plaintiffs had not produced Mr. Brain's report summarizing or explaining his opinions regarding the Plaintiffs' legal malpractice claim. CP 631 (¶ 3).

Plaintiffs' CPA claim was based upon how the Defendants handled the underlying case concerning the real access road dispute. CP 635 (¶ 4). Seeking specifics regarding Plaintiffs' apparent allegation of a CPA violation, the Lawyer Defendants propounded the following interrogatory to each Plaintiff:

> If you claim that any defendant violated any statutes, ordinances, administrative regulations, rules, codes or standards state specifically which of the aforesaid you

[8] According to a document Plaintiffs provided on November 27, 2013, Plaintiffs retained Mr. Brain as an expert witness in June 2009. CP 699-700.

> claim were violated and the manner in which it was violated.

CP 642, 651.

In response to this Interrogatory seeking specific articulation of the manner(s) in which the CPA was violated, each Plaintiff responded:

> Plaintiff's discovery is ongoing. At this time, other than the allegations of a Consumer Protection Violation, plaintiffs are unaware of any other particular statute or ordinance that was violated by the conduct of defendants. Plaintiffs reserve the right to amend this response.

CP 665, 678. Plaintiffs never amended or supplemented these responses.

In response to the Lawyer Defendants Interrogatory No. 7 – seeking the factual bases for the allegations contained in the Complaint's Paragraph 4, *see* CP 642, 651 – each Plaintiff reported that: "Plaintiff's discovery is ongoing. Plaintiffs reserve the right to amend this response as further discovery is obtained." CP 665, 678.[9] Plaintiffs never amended or supplemented these responses.

D. Facts pertaining to Defendants' summary judgment motion.

Defendants moved for summary judgment on December 6, 2013. In that motion, Defendants cited Plaintiffs' pleadings, witness disclosures and discovery responses, to demonstrate a failure of proof as to all four elements of Plaintiffs' legal malpractice claim. *See* CP 702-8. Defendants likewise demonstrated that Plaintiffs could not maintain their CPA claim because, given the facts of this case, Plaintiffs could not establish the trade

[9] Notably, Plaintiffs' respective responses to Interrogatory No. 4 are essentially lists of grievances as to how the Lawyer Defendants handled the prosecution of Plaintiffs' case in the underlying matter. *See* CP 661-64; 674-77.

or commerce, unfair or deceptive act or practice, or public interest elements of that claim. CP 709-714.

On December 23, 2013, Plaintiffs filed their opposition brief and supporting materials, including Paul Brain's declaration finally divulging his long-overdue opinions. In their response brief, Plaintiffs indicated this declaration would be the only item provided concerning Mr. Brain's opinions. CP 612 (lns. 9-22). Critically, Mr. Brain's declaration covered only the following matters: (1) his background and credentials, CP 599-600; and (2) the ways in which he believed the Defendants breached the standard of care owed to Plaintiffs. CP 600-604.[10] In that declaration, Mr. Brain did not opine on issues of damages or causation. *See* CP 599-604. Indeed, at no point prior to the summary judgment did Plaintiffs identify a damages expert to establish how they incurred damages exceeding $8 million as a result of their purchasing ten acres of real estate for $138,500. Plaintiffs' response brief did not even attempt to demonstrate the existence of the (1) unfair or deceptive act or (2) public interest elements of a CPA claim. *See* CP 621-24.

[10] Mr. Brain's declaration does not show that any of the defendants' actions fell outside the limits allowed by the attorney-judgment rule. *See Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 324 P.3d 743, 752 (2014). Further, a great deal of Mr. Brain's testimony was objectionable. Some of it was based upon assumptions without any support whatsoever, and contained factual statements at odds with his own statements, and with the Plaintiffs' own version of events. For, example, Mr. Brain stated that interrogatories were sent in March 2003 for a suit commenced in October, 2003 (paragraph 18). He also assumed (paragraph 17) Safeco was a client of Defendant Lawyers without evidence such was the case and without any specification of time.

In reply, after raising objections to the evidence submitted by Plaintiffs, Defendants demonstrated (1) the materials submitted by Plaintiffs *still* failed to create a genuine issue of material fact as to their legal malpractice claim; and (2) Plaintiffs' response still failed to create a triable issue as to their CPA claim against any defendant. CP 406-432.

On January 3, 2014, the Honorable Beth Andrus, sitting as a visiting Judge, struck some (but not all) of the evidence to which the Defendants objected. RP (1-3-14) at 63-64. She then determined Plaintiffs had not shown there was a genuine issue of material fact as to legal malpractice damages and causation thereof, because Plaintiffs failed to provide sufficient proof concerning these elements. RP (1-3-14) at 65-66. Notably, at oral argument, Plaintiffs retreated from the position that failing to seek "specific performance" in 2003 constituted legal malpractice. RP (1-3-14) at 30-34, 36, 38, 45, 47-48, 52.[11] The trial court also dismissed Plaintiffs' CPA claim, determining Plaintiffs did not (and could not) establish the public interest element of their CPA claim. RP (1-3-14) at 66-67.

E. Facts regarding Plaintiffs' motion for reconsideration.

On January 13, 2014, Plaintiffs filed a motion for reconsideration, citing CR 59(a)(1) and (7)–(9) as their bases and seeking to resuscitate their claims. In support of that motion, Plaintiffs submitted, for the first time, supplemental declarations from themselves and their expert Paul E.

[11] That fact notwithstanding, Plaintiffs apparently seek to resuscitate this theory of malpractice on appeal. *See* Appellants' Brief at 24-26, 32.

Brain, as well as declarations from Alan Murray, John Seal, and Samuel J. Elder. CP 31. As the trial court recognized, those declarations contained purported "evidence" that was not submitted before the summary judgment hearing. *Id.*

In response, after reviewing the motion and additional evidence from Plaintiffs, the Court asked the Defendants to respond to two issues: (1) whether the Court should consider the evidence not submitted with Plaintiffs' response to the summary judgment motion; and (2) whether the new evidence was sufficient was sufficient to establish a genuine issue of material fact on the issue of proximate cause as to the alleged malpractice of Defendant Leach. CP 31-32. On February 7, 2014, Defendants responsed, in the negative, to those questions. CP 140-181. Beyond their arguments that Plaintiffs' newly-submitted "evidence" was not properly before the Court, CP 146-153, Defendants objected to and moved to strike a substantial portion of those submissions as inadmissible under Washington's Rules of Evidence. CP 158-175.

On February 19, 2014, the Honorable Beth Andrus denied Plaintiffs' motion for reconsideration in its entirety, thoroughly setting forth her reasoning in a written order. CP 31-39. In so doing, the trial court exercised its discretion to refuse to consider additional evidence submitted by Mr. Brain. Further, the Court did not indicate it considered the other newly-submitted materials Plaintiffs provided in seeking reconsideration. *See id.*

V. ARGUMENT

A. Respondents renew their evidentiary objections and motions to strike made in the trial court and move to strike portions of Appellants' brief that rely on inadmissible evidence.[12]

As with their summary judgment and reconsideration briefing before the trial court, Appellants' brief relies on materials that are inadmissible under Washington's rules of evidence and which the Court excluded. CP 20-21; RP 63-64. *Compare* Appellants' Brief at 35 n.58 (citing CP 433-500), *with* RP (1-3-14) at 63-64. However, Plaintiffs have made no assignment of error concerning the trial court's evidentiary rulings on January 3, 2014 that excluded the materials.

Defendants renew their evidentiary objections and motions to strike made in the trial court at: CP 417-421; CP 158-175. In addition, Defendants ask that the Court exclude evidence they objected to below, but which the Court declined to disregard at the summary judgment hearing. (Respondents' Assignment of Error Pertaining to Cross-Appeal).

Plaintiffs' brief conflates the materials they submitted before the summary judgment hearing with those materials Plaintiffs submitted in support of their motion for reconsideration. Their arguments that the trial court erred in the summary judgment ruling fails to acknowledge that some of their cited evidence was not submitted until they moved for reconsideration. *Compare* Brief of Appellants at 25-28 (arguing from evidence submitted for the first time on reconsideration), *with* CP 31-39.

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[12] *See Cameron v. Murray*, 151 Wn. App. 151 Wn. App. 646, 214 P.3d 150, *rev. den.*, 168 Wn.2d 1018 (2010).

Not only were those materials not before the trial court when it made its summary judgment ruling, to a large extent those materials do not constitute admissible evidence. *See* CP 158-175. *See Parks v. Fink*, 173 Wn. App. 366, 375, 293 P.3d 1275 (2013), *rev. denied*, 177 Wn.2d 1025 (2013) ("We review the admissibility of evidence in summary judgment proceedings de novo.").

B. Summary Judgment

1. Scope of Review as to summary judgment

This court engages in the same inquiry as the trial court when reviewing a summary judgment order. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law.

"A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof." Tegland, 2A Wash. Prac., Rules Practice RAP 2.5, at 264 (7th ed. 2011); *see also Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978) (Appellate courts "are committed to the rule that [they] will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof.").

2. Respondents met their legal burden on summary judgment, and the trial court correctly applied the *Celotex* standard.

In response to section "III. 1. A." of Appellants' brief, Plaintiffs made this very same argument in moving for reconsideration – which argument the trial court correctly ruled was "without merit." CP 33.

It is well-settled that if the moving party is a defendant who makes an initial showing of the absence of a material fact, the plaintiff must offer prima facie evidence to support each essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The issue is not whether there existed evidentiary support for their claims in the underlying matter, but rather whether Plaintiffs could make a prima facie showing of causation in *this* matter – that is, they would have retained a better result in the underlying matter but-for the Defendants' purported misconduct. *Geer v. Tonnon*, 137 Wn. App. 838, 844, 155 P.3d 163 (2007) (citing *Daugert v. Pappas*, 104 Wn.2d 254, 257-59, 704 P.2d 600(1985)). Plaintiffs' failure to marshal sufficient evidence to support their legal malpractice claim placed the claim squarely within the *Celotex* and *Young* standard at summary judgment.

Plaintiffs argue *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991), required Defendants, in their motion, to "identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact." Appellants' Brief at 16. First, as the trial court correctly found,

White is inapposite. CP 35. In *White*, the Defendants initially moved for summary judgment due to absence of evidence on standard of care issues. *White*, at 167. It was not until their reply brief that they raised the issue of proximate causation. *Id.* at 168-69. In contrast here, as recognized by the trial court, the Defendants made clear their summary judgment motion was undergirded by failure of proof issues as to every element of Plaintiffs' legal malpractice claim, including causation and damages. CP 35.

Second, identifying portions of the record demonstrating an absence of a genuine issue of material fact is precisely what Defendants did at summary judgment. In moving for summary judgment, Defendants provided as exhibits Plaintiffs' discovery responses and witness disclosures, and pointed to Plaintiffs' lack of an expert report or other admissible evidence establishing the essential elements of the claim. *See* CP 701-14. These materials (1) demonstrated there was no genuine issue of material fact as to Plaintiffs' claims and (2) *actually formed the basis of the Defendants' motion*. Indeed, so identifying and relying upon these materials was the gravamen of the Defendants' summary judgment arguments. In proving a negative, pointing to the absence of admissible evidence regarding the issue makes the point. And that is what *Young* and *Celotex* recognize as proper.

In response, Plaintiffs provided the declaration of Mr. Brain – containing his previously-undisclosed opinions – in an attempt to create a triable issue. CP 605-624. In reply, the Defendants demonstrated that

even with those late-disclosed materials,[13] relevant law compelled summary judgment. CP 406-432.

The summary judgment standard applied by the trial court was wholly consistent with *Celotex*, *Young,* and *White*. There was no improper burden shift. At summary judgment, Plaintiffs' burden was to establish that a factual question existed that but-for the Defendants' purported misconduct, they would have achieved a better outcome in the underlying case. *Daugert*, 104 Wn.2d at 258. Because Plaintiffs failed at the summary judgment stage to provide anything tending to establish the essential causation and damages elements of their legal malpractice claim, as shown below, reasonable minds could not differ as to whether a genuine issue of material fact existed as to causation – none did.

3. The Court Properly dismissed the Plaintiffs' Consumer Protection Act claim.

The trial court correctly dismissed Plaintiffs' CPA claim, determining Plaintiffs did not (and could not) establish the public interest element of their CPA claim. RP (1-3-14) at 66-67.[14]

Whether a particular act or practice gives rise to a CPA violation is an issue of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d

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[13] Defendants objected to this late disclosure and asked the Court to not consider the opinions in connection with the summary judgment motion. CP 411-417.

[14] Because the trial court based its to decision to dismiss Plaintiff's CPA claim on their failure to establish the public interest element, Defendants focus on that element in this brief. RP (1-3-14) at 66-67. However, as was argued to the trial court, summary judgment dismissal was appropriate for the additional reason that Plaintiffs' failed to satisfy the following elements of their CPA claim: (1) the "trade or commerce" element; (2) the unfair or deceptive act or practice element; and (3) causation. *See* CP 709-714; CP 427-431.

133, 150, 930 P.2d 288 (1997). To establish a CPA violation, a plaintiff must prove each of the following five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) causes injury to the plaintiffs in their business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Michael v. Bright Now! Dental, Inc.*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009). The failure to establish any of these elements is fatal to a CPA claim. *Id.*

Plaintiffs offer no legitimate explanation as to how the **public interest element** is met in this case. *See* Appellants' Brief at 33-38. In *Short v. Demopolis*, an attorney-client dispute, the Washington State Supreme Court announced in affirming the dismissal of the client's CPA claim: "A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest." 103 Wn.2d, 52, 56, 61-62, 691 P.2d 163 (1984) (quoting *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976)). "*Lightfoot* is deemed the court's first attempt to articulate a theory which excluded from the Act purely private disputes." *Id.* at 60. *See also Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05 200 P.3d 695 (2009) ("[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest. . . . [T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated.") (internal citations omitted); *Hangman Ridge*

Training Stable, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 791, 719 P.2d 532 (1986) (same); *Behnke v. Ahrens*, 172 Wn. App. 281, 293, 294 P.3d 729 (2012) (legal malpractice; same).

The instant matter falls squarely within the rule announced in *Short* and *Lightfoot*. The basis for Plaintiffs' CPA claim is that Defendants derogated from certain obligations to Plaintiffs in the course of the underlying representation. CP 635-36. The obligations undergirding these alleged derogations arose from the attorney-client relationship between Plaintiffs and the Defendants created by contract. Importantly, as recognized in *Short*, the contract between an attorney and a client is not a consumer transaction. Rather, it is a private contractual relationship for discrete legal services.

For private disputes such as this one, the following factors have been deemed relevant: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the general public; (3) whether the defendant actively solicited the particular plaintiff, thereby indicating potential solicitation of others; and (4) whether or not the parties occupy positions of equal bargaining power. *Hangman Ridge*, 105 Wn.2d at 790-91. In elaborating on these factors, Washington courts have set forth a limiting principle that guides the public interest inquiry in private disputes. That is, the private claimant must prove "a pattern or generalized course of conduct" and "a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff." *Eifler v. Surgard Capital Mgmt. Corp.,* 71 Wn. App.

684, 697, 861 P.2d 1071 (1993); *see also*, *Michael*, *supra*, at 604-05. "[M]ere speculation" of repeated conduct will not suffice to show a potential for repetition. *Aubrey's R.V. Ctr. v. Tandy Corp.,* 46 Wn. App. 595, 610, 731 P.2d 1124 (1987) (no showing of public interest under the *Hangman Ridge* test where "[n]o other consumers were affected by the conduct").

As a threshold matter, a fair reading of Appellants' brief makes clear the conduct they contend violated the CPA was their being "dismissed" as clients. Assuming *arguendo* this is what occurred, this event and the facts and circumstances surrounding it occurred because Defendant Leach was appointed to a judicial position, which created a legal disability terminating representation. There is no basis whatsoever for finding his withdrawal – as part of cessation of his law practice – violated the CPA. Likewise, Plaintiffs' brief is void of facts, explanation, or argument as to how Defendant Knapp violated the CPA.

But ultimately, no serious argument can be made that any Defendant's conduct meets the public interest element. The uniqueness of this particular dispute – a specific situation involving Plaintiffs and their former attorneys – had no chance of affecting anybody but the parties to the legal services arrangement. Assuming *arguendo* there is any merit to Plaintiffs' contentions in this matter, there is simply no possibility of repetition. This is particularly so here because a significant event underlying this case is Plaintiffs' counsel of record ceasing law practice after his judicial appointment. As was argued orally to the trial court, RP

(1-13-14) at 14-17, this, as well as the other events Plaintiffs decry in this case, was unique and not capable of being "a pattern or generalized course of conduct." *Eifler*, 71 Wn. App. at 697.

4. The Court properly dismissed Plaintiffs' legal malpractice claim.

Appellants' brief challenging the trial court's granting of summary judgment is conclusory and confusing, particularly in the way it oscillates between theories of malpractice and fails to attribute specific damages to specific breaches or parties. On one hand, Plaintiffs argue an action for specific performance should have been brought; on the other, they insinuate a jury would have awarded more than $500,000 in damages in the underlying case – all while failing to attribute specific damages to specific breaches or parties. Their arguments are unsupported by any admissible evidence.

To establish legal malpractice causation, the burden is on the plaintiff to show that the attorney's negligence was the proximate cause of the injury. *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981). Proximate cause in a legal malpractice case is determined by the "but for" test. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001). The plaintiff/client bears the burden of demonstrating that, "but for" the attorney's negligence, the client would have obtained a better result. *Daugert*, 104 Wn.2d at 263. This showing requires proof of the "case within a case" – the plaintiff must prove that, but for the attorney's negligence, the outcome of the underlying litigation would have been

more favorable. *Geer v. Tonnon*, 137 Wn. App. at 844, (citing *Daugert*, 104 Wn.2d at 257-259).

Plaintiffs contend that determining proximate cause is "generally" the province of the jury, *see* Appellants' Brief at 21-22 (citing *Brust v. Newton*, 70 Wn. App. 286, 852 P.2d 1092 (1993)). However, it is well-settled that in a legal malpractice action the issue of whether the defendant's negligence was a proximate cause in fact of the plaintiff's damages generally is a question of fact that may be decided as a matter of law if reasonable minds could not differ. *See, e.g., Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 864-65, 147 P.3d 600 (2006). Indeed, because causation is an essential element of a legal malpractice claim summary judgment is routinely granted (and affirmed) where – as here – a legal malpractice plaintiff fails to establish a nexus between his or her claimed damages and the defendant lawyer's purported negligence. *See id.* at 865-70.[15] [16]

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[15] *See also Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009) (legal malpractice case; trial court properly granted summary judgment where plaintiff failed to show that alleged negligence proximately caused damage); *Powell v. Associated Counsel for Accused*, 146 Wn. App. 242, 191 P.3d 896 (2008) (legal malpractice case; trial court properly granted summary judgment to defendant where plaintiff could not show damage resulting from alleged attorney negligence); *Griswold*, 107 Wn. App. 757 (legal malpractice case; summary judgment for attorney appropriate where former client failed to demonstrate that attorney's delay resulted in a lesser settlement amount).

[16] To the extent Plaintiffs contend *VersusLaw v. Stoel Rives*, 127 Wn. App. 309, 111 P.3d 866 (2005), provides any useful guidance on the causation issue presently before the Court, they are mistaken. Unlike the cases on which the Court relied in granting summary judgment – namely, *Geer*, *Griswold*, and *Smith* – the *VersusLaw* opinion contains little analysis as to why there existed a triable issue of fact in that case. *Id.* at 328-29. However, the Court's discussion accompanying its footnote 24 suggests it viewed the trial court's dismissal as contrary to the *Blume* rule that "where a plaintiff settled a claim instead of pursuing available legal remedies, the court must decide based

Washington courts have repeatedly held that a plaintiff/client must make a prima facie case **through competent, admissible evidence** – not speculation or conjecture – that, "but for" the attorney's negligence, the client would have obtained a better result in the underlying case. *See, e.g., Estep*, 148 Wn. App. at 257 (summary judgment granted; "Here, Ms. Estep provides no evidence she would have prevailed"); *Griswold*, 107 Wn. App. at 761-63 (conclusory expert opinion that case would have settled for more money based on lawyer's general experience in litigation matters was properly excluded and failed to create material fact issue).

At summary judgment, the only "evidence" Plaintiffs proffered was Paul Brain's first declaration and the declaration of Plaintiffs' attorney, which submitted copies of declarations and certain records. Relying on these materials, Plaintiffs raised two theories of malpractice at summary judgment: (1) failure to seek specific performance instead of damages; and (2) dilatory conduct in prosecuting the underlying case for damages.

"In the context of a summary judgment motion, an expert must support his opinion with specific facts, and a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate." *Rothweiler v. Clark County*, 108 Wn. App. 91, 100, 29 P.3d

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on traditional principles of proximate causation whether a defendant was the cause of the injuries suffered and whether the duty to mitigate was met." *VersusLaw, Inc.*, at 329 n.24 (citing *City of Seattle v. Blume*, 134 Wn.2d 243, 260, 947 P.2d 223 (1997). Plainly, while *Blume* does not determine proximate cause as a matter of law in favor of defendants, it also does not preclude the proximate cause determination in defendants' favor.

758 (2001)." "A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). When experts base opinions on inaccurate or unsubstantiated assumptions, the opinions should be excluded. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001); *Griswold*, 107 Wn. App. at 761-62. *See also Barkhart v. Harrod*, 110 Wn.2d 381, 392 755 P.2d (1988) (Utter, J., concurring) (expert opinions based on inaccurate assumptions must be considered speculative).

Plaintiffs argue, incorrectly, that they marshaled sufficient evidence concerning causation and damages to withstand summary judgment. *See* Appellants' Brief at 24. They contend that the applicable standard is that they "must only establish that evidence supports the inference they would have achieved a better result but-for the negligence." Brief of Appellants at 27. But the standard Plaintiffs seek to advance–essentially that speculation standing on the shoulders of supposition is enough to withstand summary judgment–flies in the face of Washington legal malpractice jurisprudence.[17] For example, there was certainly enough

[17] Perhaps Plaintiffs' confusion on what standard applies to the instant matter flows from their reliance on *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), which is not a legal malpractice case. Further, Martini does not appear to standard for the proposition that a Plaintiff need only "establish that evidence supports [an] inference" to withstand summary judgment. Indeed, even the quote on which Plaintiffs rely appears to require proof that "allow[s] a reasonable person to conclude that the harm ***more probably than not*** happened in such a way that the moving party should be held liable," *Martini*, at 165 (emphasis added), which is a higher order of proof than merely proffering evidence to support an inference.

before the *Griswold* and *Smith* courts to support ***an inference*** that better results could conceivably have been obtained. But those courts required more than speculative, conclusory testimony and whatever inferences flowed therefrom.

With regard to **the "specific performance" breach theory**, first, Plaintiffs wholly abandoned this theory at oral argument, ostensibly conceding it is not a viable malpractice theory here. *See* RP (1-3-14) at 30-34, 36, 38, 45, 47-48, 52. Their new argument here appears to be that "an action for specific performance" should have been brought instead of an action for damages. Appellants' Brief at 24-25. However, Plaintiffs did not, because they could not, support this position with competent, admissible evidence establishing that an action for specific performance of the PSA would have succeeded or otherwise better served Plaintiffs than the course taken.[18] *See* CP 176-78, 418-20, 424.

Next, Mr. Brain's testimony concerning the causal nexus between this "breach" and Plaintiffs' unsubstantiated damages consisted of speculative, factually-unsupported conclusions. *See* CP 599-604. As such, it failed to create a triable issue on causation or damages. *See, e.g., Griswold, supra*, at 761-63; *see also Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 324 P.3d at 752.[19] Indeed, Mr. Brain's

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[18] In fact, the course taken appears to have been Plaintiffs' preferred course. CP 478 ("We are absolutely certain that we will file suit to recover the road completion expenses and damages, so plan accordingly.")

[19] "Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision. The plaintiff must submit

declaration failed to even identify what "specific performance" should have been pursued, what injunctive relief should have been sought, or whose performance should have been ordered. CP 599-604.

Perhaps more importantly, the "specific performance" position now advanced by Plaintiffs is undermined by the facts. In October 2003, Plaintiffs sued Westland for breach of contract. What Plaintiffs and Mr. Brain fail to recognize (or simply ignore) is that the dispute underlying the 2003 lawsuit was predicated on a breach of the PSA's terms envisioning a road with specific characteristics that could not be built without obtaining a further easement from a third-party, a neighboring property owner. Plaintiffs did not, because they could not, make any showing that an action for specific performance would actually have been beneficial or that they could have enjoyed a better outcome than the $500,000 settlement they negotiated.[20]

Plaintiffs attempt to mask this shortcoming by arguing Messrs. Seal and Murray "testified that **a road** could have been built, and the road *permitted* without the need for easements or other concessions." Brief of

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evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney.") (internal citations omitted).

[20] Given that an easement from a non-party was needed to complete the PSA-envisioned road, a specific performance action against the seller, Westland, would have failed. *See* CP 600-01 (¶6). And assuming *arguendo* the success of a specific performance action allowing Plaintiffs to take over road permitting and construction in 2003, Plaintiffs testified they had no interest in doing that work at that juncture. *See* CP 404-05. Thus, no serious argument can be made that this form of specific performance – if it could be obtained – would have benefitted Plaintiffs at the relevant time. Indeed even after they settled their case in 2009, Plaintiffs did not complete the road. *See* CP 129-30; CP 134-39.

Appellants at 26 (bold emphasis added; italic emphasis in original). Importantly, the Seal and Murray declarations were not submitted until Plaintiffs' motion for reconsideration, and it appears the trial court did not consider them in connection with that motion. But to the extent this court considers these declarations in deciding whether the trial court erred on summary judgment, a simple review of the declarations reveal ***they do not establish an action for specific performance of the PSA-envisioned road was likely to succeed.***[21] *See* CP 172-175. Plaintiffs' argument to that effect is misleading and ineffectual.

Finally, Plaintiffs appear to contend Mr. Brain's "supplemental declaration," which the trial court did not consider, *see* CP 37-38, sufficiently establishes a causal nexus between Plaintiffs' alleged injuries and Defendant Leach's pursuit of a claim for damages rather than an action for "specific performance." Appellants' Brief at 25-26.[22] Even if this court considers Mr. Brain's untimely second declaration in analyzing whether the trial court erred in granting summary judgment, despite the trial court's decision to not consider it, Mr. Brain's "supplemental"

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[21] Among other places, Plaintiffs made clear in their mediation letter in the underlying case that the heart of the dispute was the underlying defendants' failure to construct ***the road*** outlined in the PSA. CP 382. ("On the day of the mediation, the defendants will still be in breach of contract for failing to provide a road in compliance with the contract").

[22] In this section, Plaintiff's argument that "Mr. Brain concluded that he 'would draw a direct and proximate causal link between the failure' of defendants 'to exercise due diligence and any damage after the voluntary dismissal of the first action in 2005' " is non sequitur. It simply has nothing to do with the rest of Plaintiff's conclusive, speculative argument that failing to "pursu[e] equitable remedies" in 2003 somehow damaged Plaintiffs.

testimony *still* fails to create a genuine issue of material fact that Respondent Leach caused harm to Plaintiffs by not pursuing equitable remedies. Brain's "supplemental" testimony is conclusory, speculative, and not predicated on any relevant facts, information, or testimony (including the unavailing declarations from Messrs. Seal and Murray). *See* CP 158-163, 176-180.[23]

With regard to the **dilatory conduct allegation**, Plaintiffs received $500,000 when they settled claims arising from the purchase of ten acres of real estate for $138,500. They contend this shows legal malpractice damages caused by Defendants' dilatory conduct because Plaintiffs were forced to "walk[] away from an $8 million claim." Appellants' Brief at 30. Plaintiffs' position is properly rejected because they fail to show any fact-based impact of the Defendants' alleged dilatory conduct – that is, facts demonstrating Plaintiffs could have actually done better than receiving the $500,000, plus the easement.[24]

As was briefed to the trial court, *Griswold* is instructive on this issue. CP 424-426. There, in affirming summary judgment of dismissal,

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[23] For example, Brain states – again in speculative, conclusory fashion – "I believe these Defendants would have been successful in obtaining some form of equitable remedy in the first instance, and this would have substantially mitigated the damages suffered by the Plaintiffs." Once more, Mr. Brain fails to identify what equitable remedy would have been successful (much less the basis for that belief – summarily stating that "[i]nterests in property under Washington law are putatively unique" is simply not sufficient) again without identifying the equitable remedy or who the adversary would be.

[24] Regarding Plaintiffs' argument, utilizing Mr. Brain's untimely declaration, that voluntary dismissal in 2005 was somehow damaging, Appellants Brief at 25, that factually unsupported argument fails for the reasons Defendants argued below. *See* CP 159-60; CP 176-178.

the Court of Appeals held, "[the expert's] conclusory opinion that the claim would have settled for $ 1.5 million before the heart attack is not sufficient to raise a genuine issue of material fact on the element of proximate 'but for' causation." *Griswold*, at 763.

Plaintiffs erroneously contend that *Griswold*'s applicability is limited to cases where a party argues the underlying case could conceivably have settled for a higher amount. Rather, *Griswold* is important for the fact that it illustrates the type and quality of evidence needed to create a genuine issue of material fact as to causation, holding that conclusory, speculative, or factually unsupported testimony – expert or otherwise – is insufficient. *Id*; *see also Kim v. O'Sullivan*, 133 Wn. App. 557, 566-67, 137 P.3d 61 (2006) (legal malpractice; "[Plaintiff's] declaration is too conclusory to support Kim's claim that he suffered these damages."); *Estep*, *supra*, at 257.

If summary judgment was appropriate in *Griswold*, it was certainly appropriate in the present case. In *Griswold*, the plaintiff's expert provided an approximate damage figure and at least advanced a theory as to how the damages were linked to the defendant's conduct. *See Griswold*, at 761. In this case, Plaintiffs' proof fell short of even the showing found insufficient in *Griswold*. At summary judgment, Plaintiffs provided nothing *even tending to show* they would have prevailed in the underlying case within this case. *See Sherry*, 29 Wn. App. at 437. And in this case, they had no damages expert. Further, the declaration of their liability expert, Mr. Brain, in opposition to summary judgment was

completely silent on damages. Mr. Brain did not even opine the claim they "walked away from" was legitimately an $ 8 million claim.

Plaintiffs merely assume the multi-million dollar figures in the hearsay report from their expert in the underlying case, Bob Bauer, (1) would have made it to the jury in the underlying case (*i.e*, not be excluded) and that (2) the underlying jury would have returned a plaintiffs verdict in excess of $500,000. Beyond the fact that there is no basis for such assumptions, ***it is uncontroverted that Mr. Bauer is not Plaintiffs' damages expert in the present matter***. Whatever he opined in the underlying matter – legitimate or not, admissible or not – Plaintiffs cannot legitimately ask this Court to simply agree Plaintiffs would have received more than $500,000 in the underlying case when there is no competent evidence in the record to support such a conclusion.

Finally, Plaintiffs appear to suggest in a last-ditch effort that they would have "nett[ed]" more, *see* Appellants' Brief at 31, of the $500,000 settlement they received but-for Defendants' alleged malpractice. This contention fails because it is wholly speculative, if not patently false. Plaintiffs provide nothing from any attorney in the underlying matter supporting Plaintiffs' claim they would have received a $500,000 settlement at an earlier date, or absent the work Plaintiffs' subsequent attorney in the underlying matter performed on the case. Further, Plaintiffs insist they would **not** have settled at an earlier date, arguing they only settled when they did (walking away from their $8 million claim) "to stop the bleeding." Appellants' Brief at 30. Thus, had a $500,000

settlement been extended while Defendant Leach represented Plaintiffs, Plaintiffs indicate they would have rejected it and proceeded to trial (where they may have been awarded far less than $500,000, or nothing).

As shown above, the trial court correctly determined Plaintiffs failed to make a prima facie case that, but for Defendants' failure to pursue equitable relief or allegedly dilatory conduct, Plaintiffs would have enjoyed a better outcome in the underlying case. RP (1-3-14) at 66. Its ruling was consistent with Washington law and should be affirmed.

C. Reconsideration.

1. Standard of Review

This court reviews a trial court's denial of a CR 59 motion for reconsideration for abuse of discretion. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

2. The trial court did not err in refusing to consider on reconsideration evidence that was not submitted on summary judgment.

As the trial court noted in its February 19, 2014 order denying Plaintiffs' motion for reconsideration: "[o]n a motion for reconsideration after summary judgment, a trial court has the discretion to consider additional evidence submitted by the non-moving party. However, none of the cases cited by Plaintiffs require a trial court to consider such evidence if the evidence could have been discovered and presented to the court before the summary judgment." CP 36 (internal citations omitted).

The grant or denial of a motion for reconsideration is within the sound discretion of the trial court. *Lilly v. Lynch,* 88 Wn. App. 306, 321,

945 P.2d 727 (1997). Importantly, "CR 59 does not permit a [party] to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). If evidence is available to a party but not offered until after the opportunity to do so has passed, the party is not entitled to submit the evidence on a motion for reconsideration. *Wagner Dev., Inc.*, 95 Wn. App. at 907.

Plaintiffs made no legitimate showing as to why the materials they submitted for the first time on reconsideration could not have been submitted prior to the summary judgment. CP 148-153. The trial judge properly exercised her discretion. *See, e.g., Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (denying reconsideration because evidence had been available to submit before the summary judgment hearing: "[t]he realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.").[25] Indeed, as pointed out to the trial court, permitting

[25] *See also Wagner Dev., Inc., supra*, at 907; *Adams, supra*, at 608 (denying reconsideration because evidence had been available to submit before the summary judgment hearing); *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 89, 60 P.3d 1245 (2003) (finding "no abuse of discretion where the trial court refuse[d] to consider an untimely affidavit" in the summary judgment context); *Prof'l Marine v. Certain Underwriters*, 118 Wn. App. 694, 707, 77 P.3d 658 (2003) ("We grant the respondents' motion to strike Karson's declaration and do not consider it, because Lloyd's provides no reason that his declaration could not have been obtained earlier."); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) ("Because the trial court **could not on reconsideration** consider new evidence that could have been discovered prior to the trial court's ruling, Plaintiffs' argument of conditional tender and the evidence to support it is not properly before this court. CR 59(a)(4)") (emphasis added); *Sligar v. Odell,* 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (affirming denial of reconsideration of summary judgment where declaration "could have been presented at the time the trial court was considering the original summary judgment motion"); *Meridian Minerals Co. v. King*

Plaintiffs to submit a deluge of new testimony and information in seeking reconsideration would foster trial by ambush tactics, dilatory litigation, and disregard of Washington's Civil Procedure rules. CP 146-148.

3. The trial court properly denied Plaintiffs' motion for reconsideration.

In its written order dated February 19, 2014, the trial thoroughly set forth its basis for denying Plaintiffs' motion for reconsideration. The trial court's reasoning was sound, and its decision was both consistent with (if not compelled by) Washington law. That denial was not an abuse of discretion and should be affirmed. Further, even if the trial court had considered the materials submitted by Plaintiffs for the first time on reconsideration, those materials did not establish a genuine issue of material fact on the issue on proximate cause or damages. CP 156-181.

D. Cross-Appeal.

1. Plaintiffs' Malpractice Action Against Christopher Knapp, Geoffrey Gibbs and Anderson Hunter Should Have Been Dismissed Because They Were Not Served With a Summons that Invoked the Jurisdiction of the Snohomish County Superior Court.

Service of the summons for the case is required for the Court to obtain personal jurisdiction over a defendant. *See In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). "A court does not have jurisdiction over a defendant who is not properly served." *Ovtan v. David-Ovtan*, 171 Wn. App. 781, 806, 288 P.3d 57 (2012). Washington

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County, 61 Wn. App. 195, 203, 810 P.2d 31 (1991) (if the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence).

courts have held that the statutory requirements for service of a summons are jurisdictional, and that failure to comply with those requirements deprives the court of personal jurisdiction over the defendant, even if the defendant received actual notice of the proceeding. *Weiss v. Glemp*, 127 Wn.2d 726, 903 P.2d 455 (1995); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001).

To be valid, service of process must comply with statutory requirements. *Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 371, 203 P.3d 1069, *rev. denied*, 166 Wn.2d 1033 (2009). RCW 4.28.080 states that "the summons" shall be served upon the defendants in the manner specified. The documents delivered on April 26, 2011 (to only some of the defendants) did not satisfy CR 3 or RCW 4.16.170, and therefore the service did not confer jurisdiction for this Snohomish County action. *Morris*, 149 Wn. App. at 371.

CR 5 requires that the summons that was served be filed with the Court:

> "CR 5(d)(1) requires all pleadings that must be served upon parties to be filed. The summons is such a document. In addition, under RCW 4.16.170, a party must file a copy of the same summons which was served."

Lindgren v. Lindgren, 58 Wn. App. 588, 597, 794 P.2d 526 (1990), *rev. denied*, 116 Wn.2d 1009 (1991) (citation omitted). The Summons served April 26, 2011, which refers to the King County Superior Court, was not filed with the Snohomish County Superior Court. It is undisputed that the summons on file for the Snohomish County action (filed February 14,

2011) was never served upon Mr. Gibbs, Mr. Knapp, their respective spouses, or Anderson Hunter.

The trial court decided, erroneously, that the King County summons served April 26, 2011 was close enough to the one filed in the Snohomish County action in February that service on Mr. Knapp, Mr. Gibbs, and the Anderson Hunter firm had been effected through delivery of the summons for a King County Superior Court case. *See* CP 814-818. The court cited as support *Nearing v. Golden State Foods Corp.*, 52 Wn. App. 748, 752, 764 P.2d 242 (1988), *aff'd,* 114 Wn.2d 817 (1990), where the court analyzed the tolling statute, RCW 4.16.170. CP 815. However, in *Nearing*, the court said that where the plaintiff changed attorneys between the issuance of the first summons (the one served) and the signing of a copy of that summons (the one filed) by the replacement attorney, RCW 4.16.170 was satisfied because the summonses "are substantially identical." 52 Wn. App. at 752. The trial court ruled that "neither the statute nor any civil rule explicitly requires a party to serve a defendant with the identical summons filed with the complaint." (CP 5). But *Nearing* still required that the summons pertain to the same action and be "substantially identical" to satisfy the tolling statute, RCW 4.16.170.[26] *Id.*

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[26] RCW 4.16.170 provides: Tolling of statute — Actions, when deemed commenced or not commenced.

> **For the purpose of tolling any statute of limitations** an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. **If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally**, or commence service by publication **within ninety days from the date of filing the complaint.** If

In affirming the Court of Appeals, the Supreme Court held in *Nearing* that the commencement of an action is governed by CR 3, while tolling of the statute of limitation is governed by RCW 4.16.170, and that it is possible to turn to the statute standing alone to ascertain whether the period of limitations has been tolled. 114 Wn.2d at 821. Under RCW 4.16.170, when the action is commenced by filing, as here, the action is not tolled unless a summons substantially similar to the one filed in the court is served within 90 days of the filing.

In this case, the summonses served on April 26, 2011, were not substantially identical to the summons filed in the Snohomish County Superior Court on February 14, 2011. The summons failed to notify the Defendants served that an action had been filed against them in the Snohomish County Superior Court. Unlike *Nearing*, which involved a superficial difference (a signature), the difference at issue here involves a summons serving its fundamental purposes of hailing a defendant into a specific court and, correspondingly, providing legally sufficient notice of that event as required by statute. Simply stated, a served summons that fails to identify the court from which it is issued cannot be deemed "substantially identical" to a filed one that does.

> the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. **If** following service, the complaint is not so filed, or **following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.** (Emphasis added).

The trial court also cited 4.32.250[27] as a basis to excuse Plaintiffs' use of the King County summons. CP 817-818. That statute refers to "minor defects in pleadings"; but no authority holds that RCW 4.32.250 excuses the requirements for a summons, set out in CR 4(b)(1), that are necessary to exercise initial jurisdiction over a defendant. To the extent RCW 4.32.250 could apply to the initial process necessary to assert jurisdiction over a defendant, its stated limitation to "minor" defects should prevent its application to a failure to identify the very court whose jurisdiction the summons purports to extend over the person of the defendant. The identity of the county and court in which a person is to appear goes to the very function of a summons: to give notice and to formally exert personal jurisdiction by the designated court over the person served.

Here, the King County summons did not satisfy the process requirements for the Snohomish County action. Civil Rule 4 provides the requirements for a summons. It requires, in relevant part:

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[27] RCW 4.32.250 provides: Effect of minor defects in pleading.

> A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired.

> (b) Summons.
> (1) Contents. The summons for personal service **shall** contain:
> (i) the title of the cause, **specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial,** and the names of the parties to the action, plaintiff and defendant.

Civ. R. 4 (emphasis added). When a court rule uses both "shall" and "may," the word "shall" in the rule indicates the requirement is mandatory, not permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). *See also Morris*, 149 Wn. App. at 371. Whereas in CR 4(b)(2), the rule provides the defendant 'may' demand that the plaintiff file the lawsuit with the court, CR 4(b)(1) states that the name of the County Superior Court "shall" be contained in the title of the cause. Our Supreme Court selected the word "shall" to require that the summons specify the name of the court and of the county designated by plaintiff as the place of trial.

The summons served on Mr. Knapp, Mr. Gibbs, and Anderson Hunter states that it is for an action in King County Superior Court. CP 1091-92; CP 1103-04. Each summons states, in relevant part: "A lawsuit has been started against you **in the above-entitled Court** by the above named Plaintiffs." *Id.* **The heading states**: "In the Superior Court of the State of Washington In and For the **County of King**." *Id.* There is no other identification of a county or court in the summons. *See id.* The summonses delivered to these defendants were plainly not copies of the summons filed with the Snohomish County Superior Court, and they did not refer to the Snohomish County case because they stated they were

issued on behalf of the King County Superior Court. To characterize identification of the wrong county's court as a typographical error would effectively do away with a major element of the summons requirement – hailing the defendant into the named court.[28]

Washington Courts have held that "[a]mendable defects" to a summons may not be fatal if there is substantial compliance with the applicable rule or statute. *See Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC*, 116 Wn. App. 117, 64 P.3d 656 (2003) (summons specified incorrect time for filing answer); *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 264-65 108 P.3d 805 (2005) (naming party in the body of the land use petition served on all parties was substantial compliance with statute, even though the caption failed to list a party); *Ryland v. Universal Oil Co.*, 8 Wn. App. 43, 504 P.2d 1171 (1972) (substantial compliance with long arm statute sufficient). However, that rule is inapplicable here because a non-defective summons already had been issued and filed in the Snohomish County action, and Plaintiffs utilized that summons on June 16, 2011, in effecting service on defendants Leach. *See* CP 940. That summons simply was not served on Defendants Gibbs, Knapp, or Anderson Hunter. CP 1000-1001; CP 1012-1013.

[28] The Court observed that some of the defendants are lawyers. However, compliance with the rules and statutory mandates for commencing an action is not excused by a defendant's actual notice of the proceeding or by an absence of prejudice.

Plaintiffs did not need to amend the summons on file; they simply needed to serve it. What they served was just a different document from the Summons already issued and on file. No reported Washington case has held that service of a summons different from the one already filed with the court, which invokes the jurisdiction of a different Court (King County Superior Court instead of Snohomish County Superior Court), is sufficient to invoke jurisdiction in the Superior Court where the initial summons was filed.

The court also concluded "the Defendants were on notice that a lawsuit had in fact been filed against them in Snohomish County" because "the complaint correctly identified th[at] venue" and the printed docket "confirmed the existence of a filing in that court." CP 817. However, receiving such notice does not satisfy the statutory requirements for service of a summons; service of a Complaint is not alone sufficient to tentatively commence an action. *See Nearing*, 114 Wn.2d at 819-820. Furthermore, the copy of the Complaint served was unsigned, and the Notice of Appearance served with the Complaint also had the King County Superior Court heading.

Plaintiffs' service of a printed docket from the Washington Courts website also is not effective to commence an action. The docket delivered to the attorney-defendants merely provided public-record information, which cannot replace service of process. *See Weiss v. Glemp*, 127 Wn.2d 726, 903 P.2d 455 (1995). Moreover, the docket indicated that a Snohomish County Summons and Complaint were on file and that

Plaintiffs had appeared in the action pro se. CP 1011; CP 1023. That indicated the King County Superior Court summonses delivered to Mr. Knapp, Mr. Gibbs and Anderson Hunter (accompanied by the Notice of Appearance by Plaintiffs' attorney for a King County Superior Court action) were **not** copies of the summons for the case filed in Snohomish County, but might be an effort to commence a second action in the King County Superior Court by service before filing.

The King County Superior Court summons served on Mr. Knapp, Mr. Gibbs and Anderson Hunter was ineffective to assert personal jurisdiction over those defendants for this action in Snohomish County Superior Court. The spouses of Mr. Knapp and Mr. Gibbs were never served with any summons.[29] The trial court should have dismissed the plaintiffs' action against the Anderson Hunter firm, defendants Knapp, and defendants Gibbs, for failure to serve sufficient process on them.

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[29] Irrespective of whether service was effected on Mr. Knapp and Mr. Gibbs when the King County summons and other papers were delivered to them at the Anderson Hunter office, such delivery was not sufficient to make service on Jane Doe Knapp or Jane Doe Gibbs through substitute/abode service. *See* RCW 4.28.080(15) and (16). Jane Doe Knapp and Jane Doe Gibbs have never been served with any summons. Service of a summons is required to commence a lawsuit against a defendant. CR 3 and 4. RCW 4.28.020 and .080. Washington courts have also held that the statutory requirements for service of process are jurisdictional, and failure to comply deprives the court of personal jurisdiction over the defendant, even if the defendant received actual notice of the proceeding. *Weiss v. Glemp*, 127 Wn.2d 726, 903 P.2d 455 (1995); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001). No attempt was made to serve any summons on Jane Doe Knapp or Jane Doe Gibbs. The statutory requirements for service were not met, and Jane Doe Knapp and Jane Doe Gibbs should have been dismissed from the case because of insufficient process and service of process.

2. Plaintiffs' service on J. Robert Leach and Jane Doe Leach was not timely, and therefore the statute of limitations barred Plaintiffs' legal malpractice action against all defendants.

Statutes of limitation serve a valuable purpose by promoting certainty and finality and protecting against stale claims. *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 299 (1986) (citation omitted). The Legislature has determined that the statute of limitations in an action for injury to a person's property or rights is three years. RCW 4.16.080. April 16, 2008, the date the trial court in the underlying case signed the order allowing the attorney-defendants to withdraw as counsel, [30] is the latest date the limitations period could have commenced in this case. By then, Plaintiffs had retained counsel who contended Defendants' representation had been inadequate and had caused plaintiffs harm. The three-year statute of limitations for plaintiffs' legal malpractice claim therefore expired by April 16, 2011.

An action will be deemed commenced when the complaint is filed or the summons and complaint are served, whichever occurs first. Civ. R. 3; RCW 4.16.170. Both filing and service of a valid summons upon at least one defendant must occur within 90 days of each other or the statute of limitations is not tolled. *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 208, 660 P.2d 756 (1983). "Both must occur or the suit is a nullity." *Id.* Because June 16, 2011[31] was the first date a defendant was served with a

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[30] The statute of limitations likely commenced earlier for Defendant Leach, who ceased practicing law before March 1, 2008.

[31] On that date counsel for the attorney defendants accepted service of the Summons and Complaint filed by plaintiffs on February 14, 2011 in Snohomish County Superior Court on behalf of the Leach defendants, as requested by Plaintiffs.

valid Summons, and that date is more than 90 days[32] after the Complaint was filed, the statute of limitation was not tolled by RCW 4.16.170. The action was not commenced until June 16, 2011, after the three-year limitation expired. Plaintiffs' legal malpractice claim was not timely and should have been dismissed.

VI. CONCLUSION

This Court should affirm the dismissal of all claims against Defendants.

RESPECTFULLY SUBMITTED this 30th day of July, 2014.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
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Nicholas G. Thomas, WSBA #42154
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[32] The 90-day tolling period expired May 16, 2011.

DECLARATION OF SERVICE

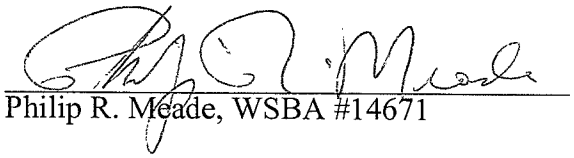
On July 30, 2014, I caused to be served a copy of the document described as **BRIEF OF RESPONDENTS/CROSS-APPELLANTS** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

Brian H. Krikorian
Law Offices of Brian H. Krikorian
4100 194th Street SW, Suite 215
Lynnwood, WA 98036

Attorney for Appellants/Cross-Respondents

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 30th day of July, 2014.



Philip R. Meade, WSBA #14671

MERRICK HOFSTEDT LINDSEY PS

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